



## **Agricultural Marketing Service**

### **7 CFR Part 930**

**[Doc. No. AMS-SC-22-0068]**

#### **Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Assessment Rate Increase**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation from the Cherry Industry Administrative Board (Board) to increase the assessment rate established for the 2022-23 and subsequent fiscal periods. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Delaney Fuhrmeister, Marketing Specialist, or Christian D. Nissen, Chief, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or E-mail: [Delaney.Fuhrmeister@usda.gov](mailto:Delaney.Fuhrmeister@usda.gov) or [Christian.Nissen@usda.gov](mailto:Christian.Nissen@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-8085, or E-mail: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 930 as amended (7 CFR part 930), regulating the

handling of tart cherries grown in the states of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Part 930 (referred to as “the Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the “Act.” The Board locally administers the Order and is comprised of producers and handlers of tart cherries operating within the area of production, and a public member.

The Agricultural Marketing Service (AMS) is issuing this rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have Tribal implications. AMS has determined that this rule is unlikely to have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, tart cherry handlers are subject to assessments. Funds to administer the Order are derived from such assessments. The assessment rate established

herein will be applicable to all assessable tart cherries for the 2022-23 crop year, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule increases the assessment rate for the 2022-23 and subsequent fiscal periods from \$0.00575 to \$0.0075 per pound of tart cherries. This rule also increases the portion of the assessment rate allocated to research and promotion from \$0.00275 to \$0.0055 per pound and decrease the portion allocated to administrative expenses from \$0.003 to \$0.002 per pound.

The Order authorizes the Board, with the approval of AMS, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Board are familiar with the Board's needs and with the costs for goods and services in their local area and can formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting, and all directly affected persons have an opportunity to participate and provide input.

For the 2020-21 and subsequent fiscal periods, the Board recommended, and AMS approved, an assessment rate that would continue in effect from fiscal period to

fiscal period unless modified, suspended, or terminated by AMS upon recommendation and information submitted by the Board or other information available to AMS.

The Board met on September 8, 2022, and unanimously recommended 2022-23 expenditures of \$1,667,000 and an assessment rate of \$0.0075 per pound, of which \$0.0055 is for research and promotion expenses, and \$0.002 is for administrative expenses. In comparison, last year's budgeted expenditures were \$1,086,500. The assessment rate of \$0.0075 is \$0.00175 higher than the rate currently in effect.

The Board recommended increasing the assessment rate to allow for more spending on health benefits research, increased spending on promotion, and to add funds to Board reserves, which have been depleted due to reduced production in previous seasons. The production during the 2022-23 fiscal period was 242,352,172 pounds, an increase from the 172,354,783 pounds produced the previous year. However, at the current assessment rate, assessment income would equal \$1,393,525, which does not meet the Board's anticipated expenditures of \$1,667,000. By increasing the assessment rate by \$0.00175, assessment income would be \$1,817,641. This amount should provide sufficient funds to meet 2022-23 anticipated expenses.

Major expenditures recommended by the Board for the 2022-23 year include \$850,000 for promotion, \$250,000 for health benefits research, and \$200,000 for salaries. Budgeted expenses for these items in 2021-22 were \$600,000, \$0, and \$258,000, respectively.

The assessment rate recommended by the Board was derived by reviewing anticipated expenses, production of tart cherries, and the level of funds in reserve. The 2022-23 crop produced 242,352,172 pounds of tart cherries, which should provide \$1,817,641 in assessment income (242,352,172 pounds multiplied by \$0.0075). However, the Board anticipates that due to approved exemptions and loss adjustments, the actual income from assessments will be closer to \$1,784,641. Income derived from

handler assessments at the rate established by this rule, along with reserve funds and interest income, should be adequate to cover budgeted expenses. Funds in the reserve (currently about \$262,732) are expected to be kept within the maximum permitted by the Order (approximately one fiscal period's expenses as authorized in § 930.42).

The assessment rate will continue in effect indefinitely unless modified, suspended, or terminated by AMS upon recommendation and information submitted by the Board or other available information.

Although this assessment rate will be in effect for an indefinite period, the Board will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. Dates and times of Board meetings are available from the Board or AMS. Board meetings are open to the public and interested persons may express their views at these meetings. AMS evaluates Board recommendations and other available information to determine whether modification of the assessment rate is needed, and further rulemaking would be undertaken as necessary. The Board's 2022-23 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by AMS.

### **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA)(5 U.S.C. 601-612), AMS has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 400 tart cherry growers in the production area and

approximately 40 handlers subject to regulation under the Order. The Small Business Administration (SBA) standard for small agricultural producers applicable to tart cherries is annual receipts of less than \$3,500,000 (Other Noncitrus Fruit Farming, NAICS 111339). Small agricultural service firms are defined as those having annual receipts of less than \$34,000,000 (NAICS 115114, Postharvest Crop Activities) (13 CFR 121.201).<sup>1</sup>

The National Agricultural Statistics Service (NASS) reported that the 2021-22 value of the tart cherry crop for processed utilization was approximately \$83 million. Production utilized for processing was 171.0 million pounds and the season average grower price for processed tart cherries was \$0.485 per pound. Dividing the crop value by the estimated number of producers (400) yields an estimated average annual receipts per producer of \$207,500 (\$83 million divided by 400 producers). This is well below the SBA threshold for small producers.

An estimate of the season average price per pound received by handlers for processed tart cherries was derived from USDA's purchases of dried tart cherries for feeding programs in the 2021-2022 season at an average price of \$4.70 per pound. The dried cherry price was converted to a raw product equivalent price of \$0.94 per pound at an industry recognized ratio of five to one. Multiplying this price by 2021 total processed utilization of 171.0 million pounds results in an estimated handler-level tart cherry value of \$160.7 million. Dividing this figure by the number of handlers (\$160.7 million divided by 40 handlers) yields estimated average annual receipts per handler of approximately \$4 million, which is well below the SBA threshold of \$34 million for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

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<sup>1</sup> The proposed rule used a SBA size standard for a small agricultural producer and service firm with annual receipts less than \$3 million and \$30 million respectively. This was an error, since in December 2022 the size standard was revised upward to \$3.5 million and \$34 million. This final rule uses the updated \$3.5 million and \$34 million standard for a small agricultural producer and service firm. The determination that the majority of producers and handlers of tart cherries may be classified as small entities has not changed from the proposed rule.

This final rule increases the assessment rate established for the Board and collected from handlers for the 2022-23 and subsequent fiscal periods from \$0.00575 to \$0.0075 per pound of tart cherries. This change also increases the portion of the assessment rate allocated to research and promotion from \$0.00275 to \$0.0055 per pound and decreases the portion allocated to administrative expenses from \$0.003 to \$0.002 per pound. The Board unanimously recommended 2022-23 expenditures of \$1,667,000 and the assessment rate of \$0.0075 per pound. The assessment rate of \$0.0075 is \$0.00175 higher than the current rate. The 2022-23 crop produced 242,352,172 pounds of tart cherries, which should provide \$1,817,641 in assessment income (242,352,172 pounds multiplied by \$0.0075). However, the Board anticipates that due to approved exemptions and loss adjustments the actual income from assessments will be closer to \$1,784,641. Income derived from handler assessments and funds from the Board's authorized reserve, should be adequate to cover budgeted expenses.

Major expenditures recommended by the Board for the 2022-23 year include \$850,000 for promotion, \$250,000 for health benefits research, and \$200,000 for salaries. Budgeted expenses for promotion and salaries in 2021-22 was \$600,000 and \$258,000, respectively. There were no budgeted expenses for health benefits research in 2021-2022.

The Board voted to increase the assessment rate to allow for more spending on health benefits research, increased spending on promotion, and to add funds to Board reserves, which have been depleted due to reduced production in previous seasons. At the current assessment rate of \$0.00575 and with the 2022-23 crop production at 242,352,172 pounds, assessment income would equal \$1,393,525 (\$0.00575 multiplied by 242,352,172), an amount insufficient to cover the Committee's anticipated expenditures of \$1,667,000. By increasing the assessment rate by \$0.00175, assessment income would be approximately \$1,817,641 (\$0.0075 multiplied by 242,352,172). This

amount, along with interest income, and funds from the reserve, should provide sufficient funds to meet 2022-23 anticipated expenses.

Prior to arriving at this budget and assessment rate, the Board considered the level of production, projected expenditures, and the amount in the authorized reserve. The Board discussed alternatives, including maintaining the current assessment rate of \$0.00575. However, leaving the assessment unchanged would not generate sufficient revenue to meet Board expenses for the 2022-23 fiscal period. Consequently, the Board determined that the assessment rate should be increased to \$0.0075 per pound to generate sufficient revenue to meet expenses. Therefore, the Committee rejected the idea of maintaining the current assessment rate.

A review of historical information and preliminary information pertaining to the upcoming season indicates the producer price for the 2022-23 season should be approximately \$0.23 per pound of tart cherries. The assessment rate of \$0.0075 per pound represents 3.26 percent of the \$0.23 revenue for the 2021-22 fiscal period as a percentage of total producer revenue ( $\$0.0075 \div \$0.23 \times 100$ ).

This rule increases the assessment obligation imposed on handlers. While assessments impose additional costs on handlers, the costs are minimal and uniform on all handlers, and some of the costs may be passed on to growers. However, these costs are expected to be offset by the benefits derived by the operation of the Order.

The Board's meeting was widely publicized throughout the tart cherry industry, and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the September 8, 2022, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. In addition, interested persons were invited to submit comments on the proposed rule, including the regulatory and informational impacts of this action on small businesses.



In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581-0177, Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes in those requirements would be necessary because of this rule. If any changes become necessary, they would be submitted to OMB for approval.

This rule does not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on February 24, 2023 (88 FR 11822). Copies of the proposed rule were also mailed or sent via email to all tart cherry handlers. A copy of the proposed rule was made available through the internet by AMS via <https://www.regulations.gov>. A 30-day comment period ending March 27, 2023, was provided for interested persons to respond to the proposal.

No comments were received. Accordingly, no changes have been made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be

sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendations submitted by the Board and other available information, AMS has determined that this rule tends to effectuate the declared policy of the Act.

**List of Subjects in 7 CFR Part 930**

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 930 as follows:

**PART 930 - TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN**

1. The authority citation for 7 CFR part 930 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. Section 930.200 is revised to read as follows:

**§ 930.200 Assessment rate.**

On and after October 1, 2022, the assessment rate imposed on handlers shall be \$0.0075 per pound of tart cherries grown in the production area and utilized in the production of tart cherry products. Included in this rate is \$0.0055 per pound of tart cherries to cover the cost of the research and promotion program and \$0.002 per pound of tart cherries to cover administrative expenses.

**Erin Morris,**

*Associate Administrator,*

*Agricultural Marketing Service.*